

No. 83-5636

Supreme Court, U.S.

FILED

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ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROGER DALE STAFFORD,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

November, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether a hearing in state court is constitutionally requires whenever a criminal defendant alleges that he did not receive the effective assistance of counsel.

2. Whether the fact that the Oklahoma Court of Criminal Appeals used the sham or mockery test in characterizing the Petitioner's trial counsel's performance is relevant when an independent review of the record reveals that the Petitioner received the effective assistance of counsel at trial.

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-vs-

STATE OF OKLAHOMA,

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RESPONDENT'S BRIEF IN OPPOSITION
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The respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma entered on June 20, 1983, and to which rehearing was denied on July 26, 1983.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 665 P.2d 1205 (Okla. Cr. 1983).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 21 O.S.Supp.1976, § 701.7, provided:

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

Title 21 O.S.Supp.1976, § 701.9, provided in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

"B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

Title 21 O.S.Supp.1976, § 701.10, provided as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11, provided as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is out-weighted by the finding of one or more mitigating circumstances the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12, provided as follows:

"Aggravating circumstances shall be:

"1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

"2. The defendant knowingly created a great risk of death to more than one person;

"3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

"4. The murder was especially heinous, atrocious, or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13, provided as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

The Petitioner, Roger Dale Stafford, Sr. (hereinafter referred to as the "Petitioner"), was convicted of six (6) counts of the crime of Murder in the First Degree in the District Court of Oklahoma County in violation of 21 O.S. 701.7. The Petitioner was convicted by a jury which then heard evidence in the second stage of the trial and found the existence of four (4) aggravating circumstances,¹ and sentenced the Petitioner to death.

The facts of the case are that the Petitioner and his brother Harold Stafford robbed a Sirloin Stockade in Oklahoma City and then herded the six (6) employees of that establishment who were present into a walk-in freezer. After assuring the employees that they were not going to be harmed, the Petitioner and his brother ordered them to sit on the floor in the freezer and then shot and killed all six employees with handguns.

The Petitioner's brother, Harold Stafford, was killed in a motorcycle accident prior to the Petitioner's arrest. The Petitioner's wife Verna, was present during the murders and testified against the Petitioner at trial.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE TRIAL TRANSCRIPT REVEALS THAT THE PETITIONER WAS EFFECTIVELY REPRESENTED BOTH BEFORE AND DURING TRIAL AND THEREFORE WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON THAT ISSUE.

The Petitioner contends that he should have received an evidentiary hearing in state court on the issue of whether he received the effective assistance of counsel in this case.

¹ The jury found that (1) the Petitioner knowingly created a great risk of death to more than one person (2) the murders were especially heinous, atrocious or cruel (3) the murders were committed for the purpose of avoiding or preventing lawful arrest or prosecution (4) there exists a probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S. 1981 § 701.12 (2)(4)(5)(7).

No authority has been cited to support the contention that a state is required to conduct an evidentiary hearing to consider a claim of ineffective representation by trial counsel. The Supreme Court has mandated hearings in state courts on certain issues in criminal proceedings. Jackson v. Denno, 378 U.S. 368 (1964) (hearing required to determine voluntariness of confession); Holloway v. Arkansas, 435 U.S. 475, 487 (1978) (trial court under duty to examine defense attorney's contention of existence of conflict of interest).

However, on other issues the Court has reviewed the facts of a particular case to determine whether constitutional error was committed by failing to hold a hearing at the defendants' request. In Watkins v. Sowers, 449 U.S. 341 (1981) the Court refused to adopt a per se rule requiring a hearing outside the presence of the jury to determine the admissibility of eyewitness identification testimony. In McMann v. Richardson, 397 U.S. 759, 771 (1970) the Court held that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his federal petition for writ of habeas corpus.

In the present case the trial record itself reveals that the Petitioner was effectively represented at trial. Prior to trial the Petitioner's attorney filed and presented evidence (the testimony of three local newsmen and 9 affidavits and various newspaper clippings) in support of a change of venue on the ground of excessive pretrial publicity (See Transcript of hearing of October 15, 1979).

The Petitioner's attorney also presented numerous additional motions prior to trial.²

At trial the Petitioner was represented by two attorneys, Mr. J. Malone Brewer and Mr. John F. Hall, who were assisted by a legal

² Motion to Produce (hypnosis), Motion to Quash, Motion to Suppress, Motion to Sequester the Jury, Motion to Strike the Bill of Particulars, Motion to List Witnesses, Motion for Production of Police Reports, Motion to Inspect, Motion for Inspection of Prosecutor's Files by Court, Motion for Change of Venue, Motion to Suppress Verna Stafford's testimony. The arguments in support of these Motions are contained in the transcript of the September 21, 1979 hearing.

intern, Mr. Rick Brewer. The six (6) volumes of trial testimony reflect that objections were repeatedly made by Mr. Brewer and Mr. Hall and that they vigorously cross-examined the crucial prosecution witnesses, including the Petitioner's wife.³ This fact was noted by the Court of Criminal Appeals in its Opinion. See 665 P.2d at 1213. The Petitioner himself testified in his own behalf (Tr. 870-1002; 1065-1069). Cf. Ferguson v. Georgia, 365 U.S. 570 (1961). The Petitioner's attorney presented opening and closing argument for him in both stages (Tr. 1106-1142; 1182-1191).

The Petitioner has failed to allege sufficient reasons as to why a hearing in state court on the issue of incompetent counsel is necessary. First, he states that a hearing would have been necessary to demonstrate a lack of investigation and preparation on the part of defense counsel and to determine why defense counsel presented no evidence in mitigation. However, without more, these allegations are not sufficient to mandate a state evidentiary hearing. McMann v. Richardson, supra; Watkins v. Sowders, supra; Stanley v. Zant, 697 F.2d 955, 964-965 (11th Cir. 1983) ("... no panel of the eleventh or fifth circuits has to date found ineffective counsel predicated on failure to call character witnesses at the penalty stage of a capital case.") Furthermore, there would have been no violation of the Petitioner's rights even if he had objected. Chandler v. Florida, 449 U.S. 560 (1981). Wainwright v. Torna, 455 U.S. 586 (1982) (where defendant had no constitutional right to counsel on a discretionary appeal, he could not be deprived of the effective assistance of counsel by failure of counsel to file a timely application for a discretionary appeal).

II.

WHERE THE TRIAL RECORD REFLECTS THAT THE PETITIONER'S TRIAL ATTORNEY PERFORMED WITHIN THE RANGE OF COMPETENCE DEMANDED OF ATTORNEYS IN CRIMINAL CASES, IT IS IRRELEVANT HOW THE OKLAHOMA COURT OF CRIMINAL APPEALS CHARACTERIZED THE CONDUCT.

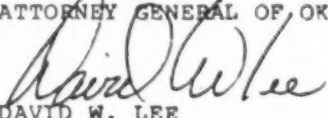
The Petitioner criticizes the test used by the Oklahoma Court of Criminal Appeals in determining whether the Petitioner received

³ The cross examination of the Petitioner's wife covers 122 pages of the trial transcript (Tr. 594-716).

the effective assistance of counsel. However, as demonstrated in the previous Proposition an independent review of the record reveals that the trial counsel performed "'within the range of competence demanded of attorneys in criminal cases'." Tollet v. Henderson, 411 U.S. 258, 266 (1973); McMann v. Richardson, 397 U.S. 759, 771 (1970); Beckham v. Wainwright, 639 F.2d 262, 267 (5th Cir. 1981).

Respectfully submitted,

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CERTIFICATE OF MAILING

On this 21st day of November, 1983, a true and correct copy of the foregoing was mailed, postage prepaid, to:

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jb

